



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS, PORTLAND DISTRICT  
P.O. BOX 2946  
PORTLAND, OR 97208-2946

CENWP-ODG

27 March 2024

MEMORANDUM FOR RECORD

SUBJECT: U.S. Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; 88 FR 3004 (18 January 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (8 September 2023),<sup>1</sup> NWP-2023-499.<sup>2</sup>

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.<sup>3</sup> AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.<sup>4</sup>

On 18 January 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (18 January 2023) ("2023 Rule"). On 8 September 2023 the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", 88 FR 61964 (8 September 2023) which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR § 331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),<sup>5</sup> the 2023 Rule as amended,

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<sup>1</sup> While the Revised Definition of "Waters of the United States"; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

<sup>2</sup> When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

<sup>3</sup> 33 CFR § 331.2.

<sup>4</sup> Regulatory Guidance Letter 05-02.

<sup>5</sup> USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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as well as other applicable guidance, relevant case law, and longstanding practice in - evaluating jurisdiction.

## 1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the Review Area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
  - i. Wetland A, non-jurisdictional
  - ii. Wetland B, non-jurisdictional

## 2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (18 January 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (8 September 2023)
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The Review Area is composed of a 3.38-acre parcel (Tax Lot 1100) at SW Western at SW 5<sup>th</sup> Warehouse near Beaverton, Washington County, Oregon at Latitude/Longitude: 45.483404°, -122.780792° (Township 1 South, Range 1 West, Section 14CB). Land use in the vicinity includes industrial, institutional, and residential developments. The Review Area is bordered to the north and west by heavily trafficked roadways, and to the east and south by existing development. The review area contains a gravel lot that extends north of the building into a mowed field. The field contains wetland that extends east into a partially forested area. Topography on site slopes gently to the north.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED.<sup>6</sup> There is no discrete flowpath from project wetlands to the Willamette River which has been determined to be a TNW by Portland District Corps

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<sup>6</sup> This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

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of Engineers as described in the October 1993 District Navigable Waters list. Project wetlands are 5.3 aerial (straight) miles from nearest TNW (Willamette River).

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. There is no discrete flow path from Wetland A or Wetland B to the Willamette River. Extreme flooding would have to occur in order for sheet flow to enter the city stormwater system through a stormwater inlet located outside the northern boundary on SW 5<sup>th</sup> St. After entering the stormwater system, water would outfall into an intermittent stream (0.6 aerial miles from the Review Area) that flows 0.71 miles to its confluence with Beaverton Creek which flows approximately 16 miles before outfalling into the Willamette River near river mile 38.
6. SECTION 10 JURISDICTIONAL WATERS<sup>7</sup>: Describe aquatic resources or other features within the Review Area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the Review Area and how it was determined to be jurisdictional in accordance with Section 10.<sup>8</sup> N/A
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the Review Area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended at 33 CFR § 328.3(a)(1) through (a)(5), consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
  - a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A

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<sup>7</sup> 33 CFR § 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

<sup>8</sup> This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR § 329.14 to make a determination that a water is a navigable water of the United States subject to Section 10 of the RHA.

- b. The Territorial Seas (a)(1)(ii): N/A
- c. Interstate Waters (a)(1)(iii): N/A
- d. Impoundments (a)(2): N/A
- e. Tributaries (a)(3): N/A
- f. Adjacent Wetlands (a)(4): N/A
- g. Additional Waters (a)(5): N/A

#### 8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the Review Area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the Review Area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).<sup>9</sup> N/A
- b. Describe aquatic resources and features within the Review Area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Wetland A: Wetland A is a 0.45-acre palustrine emergent-forested (PEME/PFOE) seasonally flooded/saturated wetland. Soils within Wetland A met hydric soil indicators Depleted Below Dark Surface (A11), Depleted Matrix (F3) and are mapped as Aloha Silt Loam, a non-hydric soil group. The following wetland hydrology indicators were met; High Water Table (A2) and Saturation (A3). The recorded sample point 2 within Wetland A was composed of 30-percent bare ground and 70-percent vegetative cover consisting of (*Carex deweyana*, facultative), (*Ranunculus repens*, facultative), (*Rubus armeniacus*, facultative) and (*Populus balsamifera*, facultative). The primary sources of hydrology for Wetland A are precipitation, surface runoff, and subsurface lateral flows. Based on a review of Light Detection and Ranging (LiDAR) data to assess topography, there is a slight sloping contour to the south (1-foot elevation change over 150 ft)

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<sup>9</sup> 88 FR 3004 (18 January 2023)

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and a depressional area that corresponds with the location of Wetland A. Wetland A extends offsite but terminates before reaching a relatively permanent water as shown in the Wetland Delineation at SW 5th Street/SW Western Avenue in Beaverton, Oregon dated November 2022. The City of Beaverton Utilities Viewer shows no mapped ditches, culverts, or other stormwater conveyances within the Review Area that might indicate a flow path from Wetland A to a relatively permanent water. Based on the lack of a continuous surface connection or adjacency to any jurisdictional waters, the Corps has determined Wetland A is a non-jurisdictional water.

Wetland B: Wetland B is a 0.12-acre palustrine emergent (PEME) seasonally flooded/saturated wetland. Soils within Wetland B met hydric soil indicator Redox Dark Surface (F6) and are mapped as Aloha Silt Loam, a non-hydric soil group. The recorded sample point 4 within Wetland B was composed of 100-percent vegetative cover consisting of (*Alopecurus pratensis*, facultative) and (*Trifolium repens*, facultative). The primary sources of hydrology for Wetland B are precipitation, surface runoff, and subsurface lateral flows. The following wetland hydrology indicators were met; Surface Water (A1), High Water Table (A2) and Saturation (A3). Based on a review of Light Detection and Ranging (LiDAR) data to assess topography, there is a depressional area that corresponds with the location of Wetland B. The City of Beaverton Utilities Viewer shows no mapped ditches, culverts, or other stormwater conveyances within the Review Area that might indicate a flow path from Wetland B to a relatively permanent water. Based on the lack of a continuous surface connection or adjacency to any jurisdictional waters, the Corps has determined Wetland B is a non-jurisdictional water.

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
  - a. Office (Desk) Determination. Date: 8 March 2024
  - b. Wetland Delineation at SW 5<sup>th</sup> Street/SW Western Avenue in Beaverton, Oregon dated August 2023.
  - c. Wetland Delineation at SW 5th Street/SW Western Avenue in Beaverton, Oregon dated November 2022.
  - d. Google Earth Pro, last accessed 8 March 2024.
  - e. Corps navigable waters' study: Corps EGIS, last accessed 8 March 2024.

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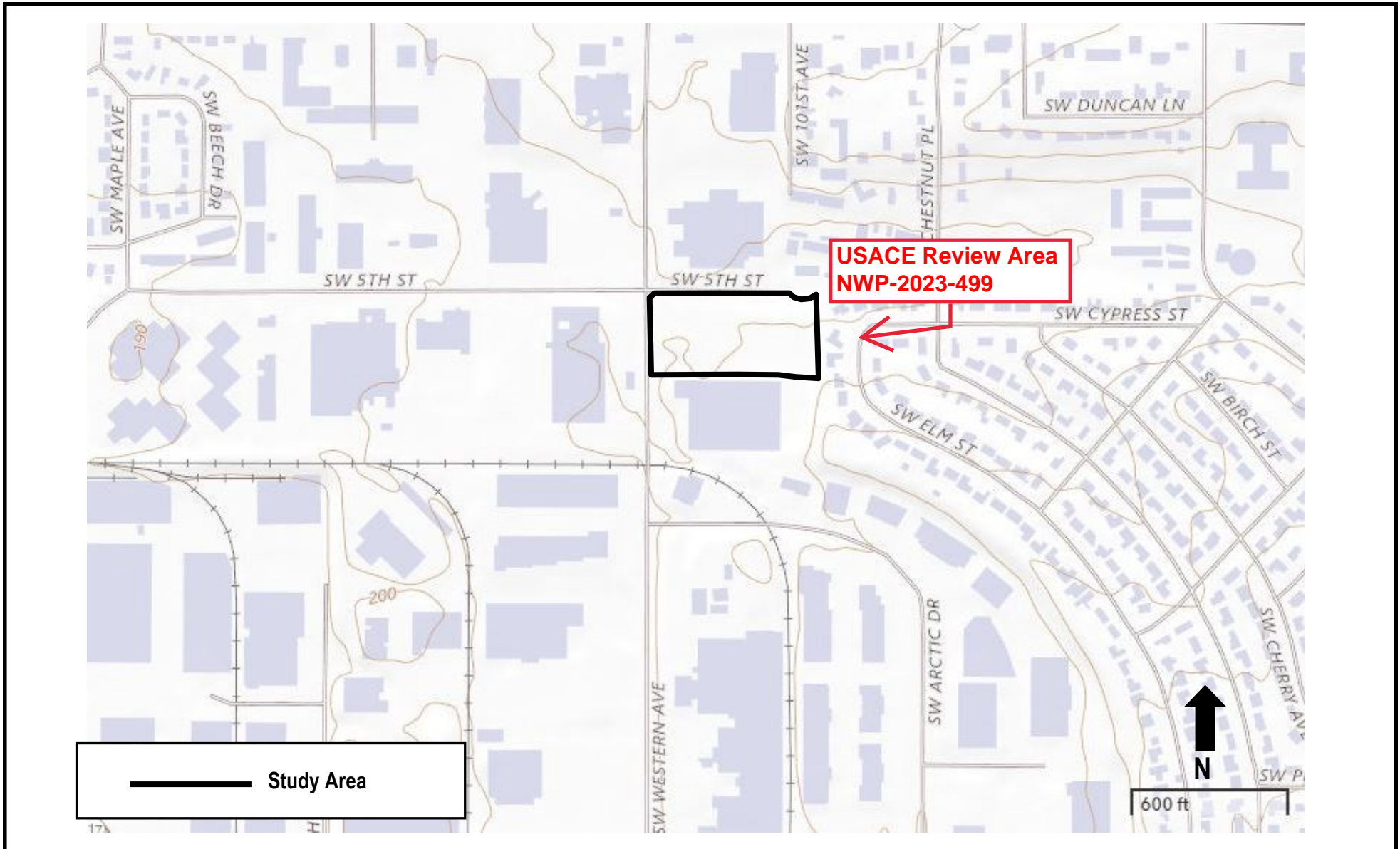
- f. United States Department of Agriculture Natural Resources Conservation Service Soil Survey. Citation: <https://websoilsurvey.nrcs.usda.gov>, last accessed 8 March 2024.
- g. Beaverton Utilities Viewer, Citation: <https://www.beavertonoregon.gov/632/Utility-Maps>, last accessed 8 March 2024.
- h. LiDAR Dataset Layer: National Regulatory Viewer, last accessed 8 March 2024.
- i. National Wetland Inventory Dataset Layer: National Regulatory Viewer, last accessed 8 March 2024.
- j. National Hydrography Dataset Layer: National Regulatory Viewer, last accessed 8 March 2024.
- k. Corps Portland District, Navigable Riverways within the State of Oregon, October 1993, last accessed 8 March 2024.

#### 10. OTHER SUPPORTING INFORMATION.

A previous wetland delineation was written on November 29, 2022 by Pacific Habitat Services of the tax lot to the south (tax lot 1000) that directly abuts the Review Area (tax lot 1100). The delineation shows where Wetland A (which continues out of the Review Area in the June 29, 2023 wetland delineation) terminates, illustrating the isolated nature of Wetland A.

On 12 March 2024 the Corps submitted this AJD to EPA Region 10 and Corps Headquarters for review. On 26 March 2024 EPA Region 10 concurred with our findings.

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.



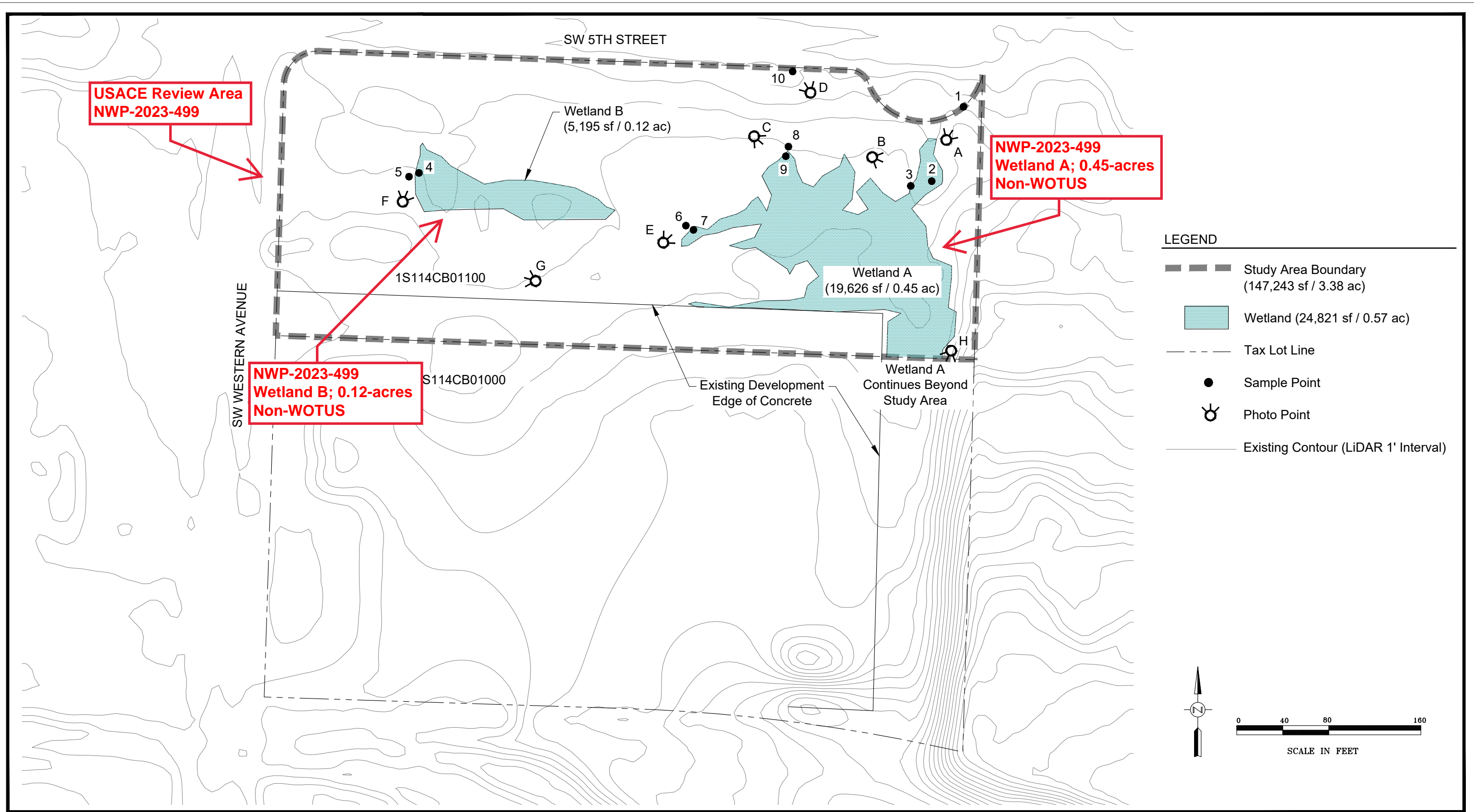
Project #7433  
5/13/2023



Pacific Habitat Services, Inc.  
9450 SW Commerce Circle, Suite 180  
Wilsonville, OR 97070

General Location and Topography  
SW 5th Street/ SW Western Avenue Property - Beaverton, Oregon  
United States Geological Survey (USGS) Beaverton, Oregon 7.5 quadrangle, 2023  
(viewer.nationalmap.gov/basic)

FIGURE  
1



Survey Provided by Pacific Habitat Services, Inc. using a Trimble Geo7x GPS unit. LiDAR obtained from DOGAMI (2014).  
Survey and Sample point accuracy is ± 3 Feet.

Wetland Delineation  
SW 5th Street / SW Western Avenue Property - Beaverton, Oregon

FIGURE  
**6**

6-27-2023